IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 39 & 293

JOSE MARIA CASTELUM-QUINONES,
*Petitioner,*

v.

ROBERT F. KENNEDY, *Attorney General of the United States.*

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR PETITIONER

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## MISCELLANEOUS

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### OPINION BELOW

The court below issued no opinion. Its opinion in a prior litigation involving the petitioner is reported at *Castelum-Quinones* v. *Rogers*, 286 F. 2d 824, and is reproduced in the record at R15-22.

## JURISDICTION

The judgment of the Court of Appeals in No. 39 was entered on September 13, 1961 (R. 48), and the petition for certiorari was filed on October 27, 1961. In No. 293, the judgment of the Court of Appeals was entered on February 23, 1962 (R. 52). A timely petition for rehearing was filed on March 9, 1962 (R. 53-55) and denied on May 7, 1962 (R. 55). The petition for certiorari was filed on August 1, 1962. Both petitions were granted on October 15, 1962 (R. 75). The jurisdiction of the Court rests on 28 U.S. Code, sec. 1254(1).

## STATUTES INVOLVED

(1) Section 241 (a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
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> * * *
>
> "(6) is or at any time has been, after entry, a member of any of the following classes of aliens:
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> * * *
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

(2) Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

(3) 28 U. S. Code, sec. 46, provides:

"(a) Circuit judges shall sit on the court and its division in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

## QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce, and could not have previously introduced, was not material, when petitioner's deportation had been previously sustained by the Court of Appeals because of the absence of such evidence.

2. Whether the Court of Appeals erred, and in effect denied petitioner judicial review, because after it had affirmed the deportation order on a misconstruction of the statute which eliminated judicial evaluation of the evidence according to standards established by deci-

sions of this Court, it then sustained the refusal of the Board of Immigration Appeals to allow petitioner to prove that he was not deportable even under the court's construction.

3. Whether, in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and *Scales* v. *United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."

4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

5. Whether the Court of Appeals violated at least the spirit of 28 U. S. Code, sec. 46, by transferring petitioner's appeal from the three-judge panel to which it was orginally assigned to a panel of which it was clearly predictable that only two of the three judges would participate, and of which only two did participate.

## STATEMENT OF THE CASE

Petitioner, a Mexican national, has resided in the United States since he entered the country in 1920 at the age of 10. He is married and supports his wife, who resides in the United States. He has two American-born children and eight American-born grandchildren who live in this country (R. 40). He was ordered deported on a finding that he had been a member of the Communist Party in 1949 and 1950 and hence was deportable under section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S. Code, section 1251 (a)(6)(C) (R. 1-4).

Two witnesses testified in support of the charge of past Communist Party membership. Daniel Scarletto testified that he had seen petitioner at about fifteen Party meetings in 1949 and 1950, some of which may not have been closed meetings, and had collected dues from the petitioner (R. 66-7, 71-4).[1] Fabian Elorriaga also testified that he had seen petitioner at Party meetings. At one point he testified that he had seen petitioner at three or four meetings a month over the three year period of 1949 to 1951. At another he testified that he only recalled petitioner attending two or three meetings in toto (R. 69-71). The Board of Immigration Appeals (hereafter BIA) did not resolve this conflict in Elorriaga's testimony, stating that the inconsistency was immaterial since under either version petitioner was a "member of the Communist Party" (R. 4).

This was the sole evidence on the subject of membership. The government introduced no evidence on the nature of petitioner's membership or that he had ever engaged in any Party activity, or that he had ever said anything at Party meetings.[2] The finding upon which the order of deportation was based was set forth by the BIA as follows (R. 6):

> "Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the

[1] The pertinent portions of the direct examination of the witness Scarletto appear in the record at 58-67. Pertinent portions of the cross-examination appear at 71-74.

[2] The BIA noted that Scarletto, the witness upon whom the BIA principally relied, "observed the [petitioner] over a reasonable period of time" (R. 2). Still, Scarletto did not testify to any activity on the part of petitioner.

respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness Elorriaga."

On this basis the BIA held, on November 14, 1957, that petitioner was deportable under section 241(a)(6)(C) of the Immigration and Nationality Act (R. 1-4). Thereafter, petitioner moved the BIA for reconsideration in the light of *Rowoldt* v. *Perfetto*, 355 U.S. 115, decided on December 9, 1957 (R. 5). On May 12, 1958 the BIA granted this request and ordered the deportation hearing reopened, stating in part as follows:

> Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. . . . Here we have nothing to prevent the drawing of the normal inferences which flow from the joining of a political party and long association with it (R. 7).
>
> "Normally, reopening would be denied. However, we shall reopen proceedings because we believe it to be in the best interest of both the government and alien. If judicial review is sought in this case and the court declares that we are wrong in our evaluation of *Rowoldt*, the Service, if it has evidence bearing on the nature of the respondent's membership, will be required to bring new proceedings, and the respondent will be faced with the prospect of defending himself before the administrative authorities and perhaps again seeking judicial review. . . . *There was little development of the respondent's awareness of the fact that he belonged to a political organization.*" (R. 8, emphasis supplied.)

At the reopened hearing no additional evidence was introduced by either side. Petitioner's counsel took the position that it was the government's burden to prove that petitioner's membership in the Party was more than nominal, and that in the absence of such proof, the government had failed to make out a case and there was no burden on the petitioner to go forward. (R. 9-12). The Special Inquiry Officer again held petitioner deportable, and on appeal the BIA affirmed, stating (R. 14):

> "The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning."

Petitioner then brought suit in the United States District Court for the District of Columbia to challenge the validity of the deportation order and the BIA's theory that once nominal membership had been shown, a meaningful association would be presumed unless the alien came forward and demonstrated the contrary. The District Court gave judgment for the government, and on appeal the Court of Appeals affirmed (per Judges Danaher and Bastian, Judge Edgerton not participating). *Gastelum-Quinones v. Rogers*, 286 F. 2d 824 (R. 15-22).

The Court of Appeals held, on that appeal, that once bare organizational membership in the Communist Party was established by the government, the alien was deportable unless he came forward and rebutted a presumption arising from the organizational membership. To this extent the court's holding was the same as the BIA's. But where the court departed from the BIA was as to the fact which was presumed. The court's holding on this subject was novel and unprecedented.

The court reasoned as follows: (1) The statute providing for the deportation of members of the Communist Party rests on (a) a legislative finding that the Communist Party espouses violent overthrow of the government and (b) a legislative presumption that members of the Communist Party personally espouse this doctrine of their organization. (2) Both the finding and the presumption are reasonable and valid. (3) The holding of the *Rowoldt* case was that *this presumption that members of the Party personally advocated violent overthrow* was rebuttable. (4) In petitioner's case, the government, therefore, had made a prima facie showing merely by showing voluntary organizational membership; and since petitioner had not introduced evidence that he had not personally espoused violent overthrow, the deportation order was correct.

Until this decision came down, neither petitioner nor the Immigration and Naturalization Service had supposed, or had had any basis for supposing, that it was a defense to the deportation of a former member of the Communist Party that he had not personally adhered to violent doctrine. On the contrary, the petitioner and the Service had shared the view that the crucial question was not personal belief in violence, but the extent of the member's participation, no matter how innocent, in Party affairs. This view is, of course, that established by *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; and *Rowoldt* v. *Perfetto*, *supra*. The issue on which petitioner and the Service had differed was on the locus of the burden of proof—whether the government had to prove the requisite degree of participation in Party affairs, all of which might be lawful and peaceable, or whether

the alien had to disprove it, once simple membership had been established.

Superficially, the Court of Appeals resolved this controvery by holding that the burden of proof was on the alien on the issue of whether his membership was of such a kind as to be cause for deportation. But the court reached this result by the road of analyzing the statute and this Court's decisions as creating a rebuttable presumption that a member personally advocated violence. There is no way of knowing how the court would have come out on the burden of proof issue if it had realized that its premises and analysis were wrong, and that whether or not membership was deportable depended on something other than personal espousal of violent doctrine.

Petitioner then petitioned this Court for certiorari (No. 711, Oct. Term, 1960). We pointed out in the petition that the Court of Appeals had formulated a rule, never before enunciated, that deportable membership was presumed, prima facie, from a showing of bare membership, and that the alien had the burden of disproving the presumption. We asserted that this presumption was at odds with *Rowoldt;* that at the very least *Rowoldt* had not settled the question as to the locus of the burden of proof on the question of meaningful membership; that the Court of Appeals had reached its conclusion on the basis of a faulty analysis of the statutory and case law; and that it was important that the issue as to the burden of proof be settled by this Court.

The government's opposition represented — with thorough inaccuracy—that the Court of Appeals had not created any new rule of law and that all that was

involved was a factual issue turning upon the evaluation of testimony. Certiorari was denied. 365 U.S. 871.

The net result was that, under the law of petitioner's case established by the Court of Appeals decision, petitioner was being deported on the basis of a rebuttable presumption that he had personally advocated violent overthrow, although neither he nor the Service had known or had reason to know that he could have rebutted this presumption, and thus establish non-deportability, by showing that despite his membership he had not so advocated.

In the face of this manifest injustice, petitioner filed a motion with the BIA requesting that the deportation proceeding be reopened so as to give him an opportunity to prove that he had never advocated or espoused violent overthrow, and thus was not deportable under the view taken by the Court of Appeals in his case. He pointed out that neither he nor the Service had previously known, or could reasonably have known, that such evidence was relevant, much less crucial. He supported his motion with an affidavit that he had never advocated or espoused violent overthrow; that he had never had any knowledge or belief that such advocacy was a tenet of the Communist Party; that he had always desired that changes should be accomplished by peaceable and constitutional means; and that if the deportation hearing were reopened he would so testify. (R. 22-27)

The BIA, after hearing oral argument, denied the motion, on the ground that the evidence which petitioner offered in his motion for reopening was not material to deportability. This was inconsistent with

the opinion of the Court of Appeals in petitioner's case. The BIA resolved this difficulty by refusing to believe that the court could have meant its assertions that the presumption to be rebutted was that a member espoused violent doctrine, since those assertions were contrary to this Court's decisions in *Galvan* and *Rowoldt*, *supra*. At the same time, the BIA relied on the court's decision as sustaining the BIA theory that deportable membership would be presumed from a showing of bare membership, unless rebutted by the alien (R. 27-32). Thus the BIA regarded the decision of the Court of Appeals as having created a rule of law—although the government had represented the contrary in its opposition to certiorari.

The BIA also rejected petitioner's argument that the case should be reopened because of the light thrown on the meaning of membership in the Communist Party by *Scales* v. *United States*, 367 U.S. 203, decided after the Court of Appeals had issued its decision in petitioner's case (R. 31).

Petitioner then filed the complaint which initiated the present litigation, challenging the validity of the BIA's denial of his motion to reopen (R. 32-36). The District Court denied a preliminary injunction (R. 41-47) and the Court of Appeals summarily affirmed the denial without opinion, per Judges Danaher and Bastian (R. 48). This decision is the subject of our petition for certiorari in No. 39.

Thereafter the District Court granted summary judgment in favor of respondent and dismissed the complaint (R. 50). Petitioner appealed this judgment to the Court of Appeals, and the respondent moved to affirm. The motion came before a division consisting

of Circuit Judges Fahy, Danaher and Bastian. This division ordered *sua sponte* that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal contesting the validity of the deportation order (R. 51). That division had consisted of Judges Edgerton, Danaher and Bastian, but Judge Edgerton had not participated. (See *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824, R. 15.) Furthermore, the affirmance of the denial of the preliminary injunction had also been by only two judges, Judges Danaher and Bastian (R. 48).

The division to which the motion had been referred then summarily affirmed the judgment of the District Court. This decision is the subject of our petition for certiorari in No. 293. The court's order of affirmance recited, "Circuit Judge Egerton took no part in consideration of the above motion." (R. 52.)

Petitioner then filed a petition for rehearing by the court en banc (R. 53-55). The petition pointed out that because of Judge Edgerton's repeated non-participation, "each of appellant's three appeals had been decided by the same two judges, and none of his appeals has been considered by three judges. And the last appeal was transferred to a panel of which, predictably, only two judges would participate." The petition submitted that in view of the unsual situation, the only practicable method by which petitioner could have the benefit of consideration by more than two judges, in accordance with the intention of 28 U.S. Code, sec. 46, was to have the case reheard en banc. On May 7, 1962, the court denied the petition for rehearing (R. 55).

## SUMMARY OF ARGUMENT

### I.

In the original appeal, the Court of Appeals upheld the order of deportation on the theory that the Act creates a presumption that a member of the Communist Party personally espouses the doctrine of violent overthrow of the government attributed to that Party. It held that this presumption is rebuttable by the alien, and that if rebutted, the alien is not deportable. Under this rule of law laid down by the Court of Appeals, petitioner is not a deportable alien on the basis of the evidence he offered to present to the Immigration Service.

The BIA, however, took the position that the evidence offered by the petitioner was immaterial under the decisions of this Court and it refused to follow the law of the case as laid down by the Court of Appeals. But it was not at liberty to do so, since the rule laid down by the Court of Appeals was binding upon both the lower court and the BIA as the law of the case. The fact that the reasoning of the Court of Appeals was inconsistent with decisions of this Court did not give the BIA leeway to pick and choose which portions of the appellate court's opinion it would follow. Moreover, as we show below, the view of the Court of Appeals that the alien had the burden of proof is also inconsistent with the decisions of this Court. The law of the case rule would be stultified if a lower adjudicatory body may select as authoritative those portions of an appellate court ruling of which it approves, while rejecting those portions which it disapproves.

Since it was not open for the BIA to disregard the law of the case as laid down by the Court of Appeals,

it was erroneous for the District Court to hold the BIA action justified. Accordingly, both the BIA and the District Court erred in holding petitioner deportable because by so holding they disregarded the law of the case as established by the Court of Appeals in a prior decision.

When the case returned to the Court of Appeals, the court had two options. It could have reversed the District Court and thus the BIA, for failing to apply the law of the case as established by the intitial decision of the Court of Appeals. Or, if it realized that the initial decision was based on a palpably erroneous theory and analysis, the court could have discarded its prior ruling and reexamined the case to determine whether petitioner was deportable under a correct view of the law. The Court of Appeals, however, took neither of these only two permissible courses. Instead, summarily and without explanation, it affirmed the BIA's refusal to reopen. For all practical purposes, although petitioner has now had three Court of Appeal decisions that he is deportable, he has been denied judicial review in any realistic sense.

## II.

*Rowoldt* v. *Perfetto* held that the statutory provision for deporting past "members" of the Communist Party applied only to membership which had a certain political significance described as a "meaningful association." In the present case, the evidentiary findings on membership, which were less than those in *Rowoldt*, were insufficient to support deportability. In the subsequent case of *Scales* v. *United States*, this Court held that the term "member" of the Communist Party applied only to "active" members. The BIA findings cannot justify a holding of "active" membership by the petitioner.

The BIA compensated for the lack of proof of deportable membership by holding that once a bare, organizational membership had been shown, the burden of proof shifted to the alien to show that his membership was not a "meaningful association." It justified the holding by asserting that an "inference" of meaningful association "normally follows from the joining and association with a political party." The BIA ruling is unsound in principle, contrary to precedent, and inconsistent with experience.

The burden of proving that a resident alien is within a deportable class is squarely upon the government. The deportable class in this case is a member whose membership was a "meaningful association" or "active." This burden was clearly not carried by showing something substantially less, a bare organizational membership. *Rowoldt* itself refused to infer a "meaningful association" from any lesser showing or any "normal" situation.

Experience does not sustain the BIA view that there is a normal inference that membership in the Communist Party is a meaningful association within the doctrine of *Rowoldt*. It has been found in a number of cases that the evidence, though establishing Party membership, did not support deportation under this test. In view of the resources at the government's command and its notorious close surveillance of the Communist Party, the government's inability to prove more than nominal membership indicates that there was nothing more to prove. The failure of the government witnesses who observed the petitioner in the Party to testify that he did anything more than attend some meetings and pay dues is a strong indication that his participation in the Party was of slight significance.

The deportation statute provides that "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Under this test and under section 10 of the Administrative Procedure Act, administrative orders may not be based upon evidence which merely creates a suspicion of the fact to be proved or which gives equal support to inconsistent inferences. Moreover, no other court decision applying *Rowoldt* has placed on the alien the burden of proving that his membership was not a meaningful association. The harsh nature of the statute necessitates holding the government to strict standards of proof.

## III.

The failure of the Court of Appeals to accord petitioner any meaningful judicial review was aided and compounded by its peculiar course in assigning judges to the division which determined petitioner's appeals. The initial appeal was decided by only two judges and the second appeal, that from the denial of a preliminary injunction, was decided by the same two judges which disposed of the first. The third appeal was assigned to a new division which *sua sponte* transferred the case to the division which had decided the first two appeals. As anticipated, Judge Edgerton, the third member of that division, who had previously twice abstained, abstained again. Thus the transfer order was not to a division of three judges but to the same two judges who had, in the original decision, misunderstood the applicable deportation law.

This course violated the spirit of 28 U.S. Code section 46. That section requires that an appeal be determined by a division of three judges or by the full

court. While it provides that two judges shall constitute a quorum of a three-judge division, the basic intention is that decisions shall be by three judges. This intention was vitiated by a transfer which guaranteed that only two judges would participate. Moreover, the two judges who did participate simply washed their hands of the matter, the new appeal being decided summarily and without explanation. This process did not comport with the proper administration of justice.

## ARGUMENT

### I. THE BIA AND THE DISTRICT COURT ERRED BECAUSE THEY DID NOT APPLY THE LAW OF THE CASE ESTABLISHED BY THE COURT OF APPEALS. THE COURT OF APPEALS ERRED BECAUSE IT NEITHER FOLLOWED THE LAW OF THE CASE NOR REEXAMINED THE CORRECTNESS OF ITS ORIGINAL HOLDING

#### A. The First Decision of the Court of Appeals Established as the Law of the Case that Petitioner was not Deportable if He Could Rebut a Presumption, Arising from Communist Party Membership, that He had Personally Espoused Violence. Accordingly, the BIA and the District Court Erred, in Denying Petitioner the Opportunity to Rebut the Presumption.

In the original appeal, the Court of Appeals upheld the order of deportation on the theory that the Act creates a presumption that a member of the Communist Party personally espouses the doctrine of violent overthrow of the government attributed to that Party. It held that this presumption is rebuttable by the alien, and that if rebutted, the alien is not deportable. As the court stated in its opinion (emphasis supplied):

> "*The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation pro-*

*ceding* by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party and (3) *the presumption that a member of a political organization espouses the tenets of the organization.*

"In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the 'meaningful association' required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan. Rather, we think that Rowoldt amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.*

"Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. *Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a prima facie case by proving voluntary membership.*" (286 F. 2d at 828; R. 21.)

Petitioner filed a petition for rehearing with the Court of Appeals in which he expressly argued that the Court's analysis of the deportation statute as creating a rebuttable presumption of personal advocacy was erroneous. The court denied the petition for rehearing, thereby adhering to the analysis set forth in its opinion. Petitioner then petitioned for certiorari to this Court (No. 711, October Term, 1960). Cer-

tiorari was denied, 365 U.S. 871, thus leaving the opinion of the Court of Appeals as the rule of law in petitioner's case.

If, as the Court of Appeals held, deportability hinges on a rebuttable presumption, derived from Party membership, that the alien personally espoused violent overthrow, then testimony by the alien that he never personally so espoused and was never aware that the Communist Party had any such tenet is obviously relevant and material to rebut the presumption. Indeed, such evidence may be crucial, for if believed, it rebuts the presumption and defeats deportation. Accordingly, under the rule of law laid down by the Court of Appeals, petitioner is not a deportable alien on the basis of the evidence he offered to present to the Immigration Service.

The BIA, however, took the position that the evidence offered by the petitioner was immaterial under the decisions of this Court. Accordingly, it refused to follow the law of the case as laid down by the Court of Appeals. But it was not at liberty to do so. For whether the rules laid down by the Court of Appeals were correct or incorrect, they were binding upon both the lower court and Board of Immigration Appeals as the law of the case. *Insurance Group Comm.* v. *Denver & R.G.W.R. Co.*, 329 U.S. 607; *Re Sanford Fork & Tool Co.*, 160 U.S. 247. This law of the case was established not by the narrow holding of the appellate court, i.e., affirmed or reversed, but by its opinion and its reasoning. As stated in *Thompson* v. *Maxwell Land Grant & R.R. Co.*, 168 U.S. 451, 456:

> "It is the settled law of this Court, as of others, that whatever has been decided on one appeal or

> writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.
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> • • • • • • • • • • •
>
> "We take judicial notice of our own opinions and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, on what grounds the judgment was rendered and what has become settled for future disposition of the case."

Hence, the BIA erred in holding that the Court of Appeals decision made petitioner deportable because he had not rebutted a presumption arising from the Government's *prima facie* case of bare membership, while at the same time rejecting as erroneous the Court of Appeals ruling as to the nature of that presumption and the character of the evidence relevant to rebut the presumption.[3] The fact that the reasoning of the Court of Appeals was inconsistent with decisions of this Court did not give the BIA leeway to pick and choose which portions of the appellate court's opinion it would follow. For the law of the case established by the superior tribunal was binding on the inferior tribunal whether right or wrong. Moreover, as we show below, the view of the Court of Appeals that the alien must carry the burden of proof as to an essential element of

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[3] There is no issue posed here as to whether the petitioner's offer of rebuttal evidence came too late, since the decision of the BIA rested upon the ground that the evidence which petitioner offered was irrelevant and not that the offer was tardy (R. 31). Moreover, rejection of the evidence on the ground that it was tardily offered would have been a gross abuse of discretion. As petitioner's motion to reopen shows (R. 23, 27), and as the BIA decision demonstrates, prior to the Court of Appeals decision, petitioner was fully justified in believing that evidence of his personal non-espousal of violent doctrine was not relevant and would not be admitted at the deportation hearing.

deportability is also inconsistent with the decisions of this Court. The law of the case rule would be stultified if a lower adjudicatory body may select as authoritative those portions of an appellate court ruling of which it approves, while rejecting those portions which it disapproves.

Nor could it be assumed that the Court of Appeals would have arrived at the same result if it had correctly analyzed the statutory scheme and the decisions of this Court. The Court of Appeals believed that the statutory scheme was constitutionally valid because it rested on a premise of the alien's personal advocacy of force and violence, misreading this Court's decision in *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Had the court appreciated that the statutory scheme was much harsher than it supposed, since it made the alien's personal advocacy irrelevant to the issue of deportability, it is by no means certain that the court would have made the statute even harsher by shifting the burden of proof as to the character of membership in the Party from the government to the alien. In fact the court placed the burden on the alien only on the assumption that he could carry the burden by evidence that he did not personally advocate the violent overthrow of the government.[4]

Since it was not open for the BIA to disregard the law of the case as laid down by the Court of Appeals, it

[4] We do not mean to imply that the court was justified in shifting the burden to the alien even under its view of the statute. At least in the absence of an express congressional declaration, and there is none here, there is no warrant for shifting the burden of proving any element of deportability from the government to the alien, see *infra* p. 28. The point is merely that the Court of Appeals decision must be taken as it was rendered. Since its premise and reasoning were incorrect, it does not follow that it would have reached the same result on the basis of correct premises and reasoning.

was erroneous for the District Court to hold the BIA action justified. Accordingly, both the BIA and the District Court erred in holding petitioner deportable because by so holding they departed from the law of the case established conclusively for them by the first decision of the Court of Appeals.

**B. When the Case Returned to the Court of Appeals, It Erred Because It Neither Applied the Law of the Case nor Reexamined the Correctness of Its Earlier Holding**

In the District of Columbia Circuit, as elsewhere, the Court of Appeals will normally adhere to its prior decision in the same litigation as establishing the law of the case, without reexamining the merits of the original holding. However, the law of the case rule is a rule of practice, not a limitation on the court's power, and the court will disregard the rule when, but only when, "a clear case . . . [is] . . . presented showing that the earlier adjudication was plainly wrong and that application of the rule would work manifest injustice." *Mayflower Hotel Stockholders Protective Committee* v. *Mayflower Hotel Corp.*, 193 F. 2d 666, 669; *Brown* v. *Gesellschaft Fur Drahtlose Tel.*, 104 F. 2d 227, 228; *Davis* v. *Davis*, 96 F. 2d 512; *Messinger* v. *Anderson*, 225 U.S. 436, 444.

Accordingly, when the case returned to the Court of Appeals, the court had two options. It could have reversed the District Court, and thus the BIA, for failing to apply the law of petitioner's case as established by the initial decision of the Court of Appeals. Or, if it realized that the initial decision was based on a palpably erroneous theory and analysis, the court could have discarded its prior ruling and reexamined the case to determine if petitioner was deportable under the

correct view of the law. Such a reexamination should, as our next section demonstrates, have resulted in a setting aside of the deportation order.

The Court of Appeals, however, took neither of these only two permissible courses. Instead, summarily and without explanation, it affirmed the BIA's refusal to reopen. The court first did so on the appeal of the District Court's denial of a preliminary injunction, and it repeated this action on the appeal from the summary judgment on the merits. For all practical purposes, although petitioner has now had three Court of Appeals decisions that he is deportable, he has been denied judicial review in any realistic sense. On the first occasion, the court affirmed on an erroneous theory which it had devised *ex mero motu*, neither party having suggested it. On the next two occasions, the court failed both to enforce its original theory or to reexamine the case on a correct theory. The net result is that petitioner has received only the detriment and none of the benefit of either the court's view of the law or the correct view of the law. Under the former he is not deportabe because he was never given an opportunity to rebut the court's rebuttable presumption of personal espousal of violence. Under the latter he is not deportable because the Service never proved he was a member of a deportable class. We now turn to a demonstration of this.[5]

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[5] The original decision of the Court of Appeals does not, of course, establish the "law of the case" for this Court. *Messenger* v. *Anderson*, *supra*. We submit, therefore, that the most appropriate course would be for this Court to examine the validity of the deportation order on the basis of the correct applicable premises, without regard to the erroneous reasoning of the court below.

## II. UNDER A CORRECT VIEW OF THE LAW, PETITIONER IS NOT DEPORTABLE BECAUSE THE SERVICE FAILED TO PROVE THAT HIS MEMBERSHIP IN THE COMMUNIST PARTY WAS A "MEANINGFUL ASSOCIATION" OR "ACTIVE."

### A. The Service's Evidentiary Findings Show Only a Bare Organizational Membership

*Rowoldt* v. *Perfetto*, 355 U.S. 115, held that the statutory provision for deporting past "members" of the Communist Party applied only to membership which had a certain political significance described as a "meaningful association." Aliens whose membership was only "nominal"—i.e., which did not reach the "meaningful association" standard—are not deportable.

In the present case, the evidentiary findings on membership consist exclusively of findings of attendance at an unknown number of closed Party meetings (less than fifteen, see *supra* p. 5), and payment of Party dues. These findings obviously do not approach those which *Rowoldt* held insufficient to support deportability. For in *Rowoldt*, the alien belonged to the Communist Party for about a year, attended closed Party meetings, paid dues, ran a Party bookstore (355 U.S. at 116-18), and had a "considerable, albeit rudimentary knowledge of Communist history and philosophy." (355 U.S. at 125, dissenting opinion). In the present case, the BIA overstated the situation when it observed (R. 8), "There was little development of [petitioner's] awareness of the fact that he belonged to a political organization." There was, in fact, no development of any such awareness.

Moreover, the *Rowoldt* doctrine has been extended by the Court so as to circumscribe even further the meaning of Communist Party membership. *Scales* v.

*United States*, 367 U.S. 263, held that the term "member" applied only to "active" members. While this was a criminal prosecution for violation of the Smith Act's membership clause, the Court relied on *Rowoldt* and the preceding deportation case of *Galvan* v. *Press*, 347 U.S. 522, as justifying this meaning for membership. The Court stated (at 222):

> "We decline to attribute to Congress a purpose to punish nominal membership . . . not merely because of the close constitutional questions that such a purpose would raise . . ., but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act. Nor can we assume that it was Congress' purpose to allow the quality of the punishable membership to be measured solely by the varying standards of that relationship as subjectively viewed by different organizations. It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself, thereby assuring an even-handed application of the statute.
>
> "This Court in passing on a similar provision requiring the deportation of aliens who have become members of the Communist Party—a provision which rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality as this enactment—had no difficulty in interpreting 'membership' there as meaning more than the mere voluntary listing of a person's name on Party rolls. *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, 355 U.S. 115 . . . A similar construction is called for here."

In line with this reasoning the Court sustained a charge to the jury by the trial court reading as follows (at 255, ftn. 29):

> "The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member. It must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

The Court's reasoning in *Scales*, as well as its citation of *Rowoldt and Galvan*, indicate that the term "member" in the deportation statute means the same as "member" in the Smith Act. The same considerations apply in both situations, namely, the constitutional questions posed by a contrary interpretation, the probabilities that Congress did not intend so harsh a statute to be applied to mere passive members, and the desirability of an "objective standard fixed by the law itself, thereby assuring an even-handed application of the statute." Moreover, both the deportation provision and the Smith Act provision trace their original source to the same statute, the Alien Registration Act of 1940, 54 Stat. 670 ff. It would be illogical to assume that Congress meant the same word to have different meanings when employed in different sections of the same statute.

It is not necessary, in the present case, to go as far as the trial court in *Scales*, so as to hold that in order for the government to prove membership it had to show that petitioner "devoted all, or a substantial part, of his

time and efforts to the Party." For present purposes, it is sufficient to apply the rule that petitioner is not deportable unless he was an "active" member. For the BIA findings cannot justify a holding of "active" membership by the petitioner regardless of what content is imparted to that term. The BIA found only bare membership as evidenced by petitioner's attendance at meetings and payment of dues.[6] The establishes neither the "meaningful association" required by *Rowoldt* nor the "active" membership required by *Scales*.

**B. "Meaningful Association" or "Active" Membership May Not Legitimately be Inferred From a Showing of Bare, Organizational Membership**

The BIA compensated for the lack of proof of deportable membership by holding that once a bare, organizational membership had been shown, the burden of proof shifted to the alien to show that his membership was not a "meaningful association." It justified the holding by asserting that an "inference" of meaningful association "normally follows from the joining and association with a political party" (R. 7). The BIA's ruling is unsound in principle, contrary to precedent, and inconsistent with experience.

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[6] In its opposition to the petition for certiorari in No. 39 (R. 520, Oct. Term, 1961), the government misrepresented that there was "evidence . . . that petitioner was an active . . . member of the Communist Party" (at p. 8). But it is not necessary for the Court to examine the evidence, since it is plain that the BIA made no such finding, but found only bare organizational membership, which, it considered, made out a *prima facie* case shifting the burden to petitioner. The Court is limited to reviewing the case on the basis of the findings and analysis made by the administrative agency and not on a new basis offered by counsel on appeal. "The courts may not accept appellate counsels' *post hoc* rationalization for agency action." *Burlington Truck Lines, Inc., et al. v. United States et al.*, 371 U.S. 156, 168-9; see also *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 196.

That the burden of proof of deportability rests upon the Service has heretofore been unquestioned. *Kimm* v. *Rosenberg*, 363 U.S. 405, 412-13 (dissenting opinion);[7] *Chew* v. *Rogers*, 257 F. 2d 606; *Zitó* v. *Mountal*, 174 F. Supp. 531, 538. The deportable class in this case is that of members whose membership was a "meaningful association" or "active." This burden is clearly not carried by showing something substantially less, namely, a bare organizational membership. In this very case, the BIA's own statement that "There was little development of the [petitioner's] awareness of the fact that he belonged to a political organization," shows that the burden was not carried. And this statement, as we have seen, was an exaggeration.

*Rowoldt* itself refused to infer a "meaningful association" from any lesser showing or "normal" situation. It stated that, "There must be a substantial basis for finding" meaningful membership, and that a "solidity of proof . . . is required." (355 U.S. at 120). *Rowoldt* did not set aside the deportation order on a finding that Rowoldt's membership *was* without political significance, but on a finding "that the dominating impulse to his 'affiliation' with the Communist Party *may well have been* wholly devoid of any 'political' implications" (at 120, emphasis supplied).

Experience does not sustain the BIA's view that there is a normal inference that membership in the Communist Party is a meaningful association within

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[7] "It has not been, and scarcely could be, controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings the deportability of an alien; whatever the exceptions to the rule may be, it was established by the time relevant here that where post-entry misconduct is charged as the basis for deportability, the burden is the Government's."

the doctrine of *Roncoldt*. The large flow of persons in and out of the Communist Party in past years indicates the contrary. So does *Roncoldt* and other cases in which it was found that the evidence, though establishing Party membership, did not support deportation. *E.G., Diaz v. Barber*, 261 F. 2d 300; *Martinez v. Rogers*, Dist. Ct. D.C., Civil No. 1538-59, decided Dec. 7, 1959; *Matter of Grondahl*, A-5192494 and A-5187131, decided by BIA June 12, 1959. In view of the resources at the government's command and its notorious close surveillance of the Communist Party, the government's inability to prove more than mere organizational membership in a particular case indicates that there was nothing more to prove. In this very case the government produced two witnesses who observed petitioner in the Party.[8] Their failure to testify that he did more than attend some meetings and pay dues is a strong indication that his participation in the Communist Party was of slight significance.

Congress has expressly provided, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Immigration and Nationality Act, § 242(b)(4), 8 U.S. Code, § 1252(b)(4). This is a more rigorous test than the "substantial evidence" requirement of section 10 of the Administrative Procedure Act, 5 U.S. Code § 1009, which is also applicable to deportation orders, *Shaughnessy v. Pedreiro*, 349 U.S. 48. Yet even section 10 rules out administrative orders resting on evidence which merely creates a suspicion of the ultimate fact to be proved or which gives equal support to incon-

[8] As previously noted, the BIA commented that Scarletto, the witness upon whom the Bon d principally relied "observed the [petitioner] over a reasonable period of time" *supra* ftn. 2.

sistent inferences. *N. L. R. B.* v. *Columbian E. & S. Co.*, 306 U.S. 292, 300; *Appalachian Elec. Power Co.* v. *N. L. R. B.*, 93 F. 2d 985, 989; *Zito* v. *Moutal*, 174 F. Supp. 531, 537-38; see *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229. Since the Board's "normal inference" was drawn from evidence which could just as well have supported a contrary inference, it did not satisfy the substantial evidence requirement.

Moreover, no other court decision applying *Rowoldt* has placed on the alien the burden of proving that his membership was not a meaningful association. Instead, the reviewing courts have determined whether meaningful association was or was not established by the totality of the evidence in the record. *Niukkanen* v. *McAlexander*, 265 F. 2d 825 (9th Cir.), aff'd 362 U.S. 390; *Diaz* v. *Barber*, 261 F. 2d 300 (9th Cir.); *McKay* v. *McAlexander*, 268 F. 2d 35 (9th Cir.); *Schleich* v. *Butterfield*, 252 F. 2d 191 (6th Cir.), cert. den. 358 U.S. 814; *Williams* v. *Mulcahey*, 253 F. 2d 709 (6th Cir.), cert. den. 356 U.S. 946; *Wellman* v. *Butterfield*, 253 F. 2d 932 (6th Cir.). As the Ninth Circuit stated in *Niukkanen* (265 F. 2d at 828):

> "The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words 'meaningful association' as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under current consideration."

Similarly, the government's brief in *Niukkanen* in this Court observed:

> "And all lower court rulings since *Rowoldt* have considered the total evidence in determining

whether there was *substantial basis* for a finding of consciousness by the alien that he was joining an organization known as the Communist Party which operates as a distinct and active political organization." (Brief in No. 130, Oct. Term 1959, p. 22, emphasis supplied.)

In the present case neither the BIA nor the court below applied this test. If they had, since the evidence showed even less than was present in *Rowoldt*, they would necessarily have found that the government had failed to carry its burden of proving a "meaningful association."

It is true that in *Rowoldt*, unlike here, the alien described the nature of his membership in a prehearing interview (though standing mute at the deportation hearing). But this supplies no warrant for requiring an exculpatory statement from the alien before the *Rowoldt* doctrine is applied. The important thing is the nature of the evidence, not its source. Whatever the source, the burden of proof is on the Service. Rowoldt defined what had to be proved in order to establish deportable membership. But there is nothing in the opinion that implies a novel rule as to the source or the burden of proof.

The need to hold the government to strict standards of proof is emphasized by the nature of the statute. The Communist deportation provisions impinge on human rights with dubious offsetting social advantage. The harshness and unfairness of the statute was noted in the very decision which sustained it (*Galvan* v. *Press*, 347 U.S. 522, 530), and the statute's "constitutionality was upheld here only on historical grounds" (*Kimm* v. *Rosenberg*, 363 U.S. 405, 415, dissenting

opinion).[9] If the deportation order against petitioner is sustained, he will be banished after forty-two years of residence in the United States, where he has lived since he was ten years old, and will be separated from his wife, his children, his grandchildren and his economic roots. These consequences have been decreed for nothing more than conduct which was innocuous, non-criminal and constitutionally protected—attendance at some Communist Party meetings and payment of dues. And one may be sure that the attenuation of the standards of proof in this political deportation case will have a corresponding effect in non-political cases.

Expulsion of an alien from the society to which he was admitted and by which he has been assimilated is comparable in its nature and consequences to the denaturalization of a citizen. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231; *Galvan* v. *Press*, 347 U.S. 522, 530; *Trop* v. *Dulles*, 356 U.S. 86, 98. Indeed, one of the harshest features of denaturalization is that it may subject the individual concerned to deportation. See *Trop* v. *Dulles*, *supra* at 102. Because of the harsh consequences, this Court has established the requirement in expatriation and denaturalization cases that the government must prove its case by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.' " *Perez* v. *Brownell*, 356 U.S. 44, 47; *Schneiderman* v. *United States*, 320 U.S. 118, 158. A like concern for human rights forbids deportation on the flimsy evidence in this record.

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[9] Moreover, it appears that *Galvan* misread the history. See Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L. J. 1578, 69 Yale L. J. 262 (two articles), particularly 69 Yale L. J. at 287-89.

### III. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE OF THE FAILURE OF THE COURT BELOW TO MAKE THREE JUDGES AVAILABLE

The failure of the Court of Appeals to accord petitioner any meaningful judicial review was aided and compounded by its peculiar course in assigning judges to the division which determined petitioner's appeals. The initial appeal was decided by only two judges (Danaher and Bastian), the third (Edgerton) not participating for unstated reasons. The second appeal, that from the denial of a preliminary injunction, was decided by the same two judges which disposed of the first. The third appeal was assigned to a new division, consisting of Judges Fahy, Danahar and Bastian. This division *sua sponte* transferred the case to the division which had decided the first two appeals. (Supra, p. 12.) In view of the fact that Judge Edgerton had twice abstained, the transferring division must have known that he would again abstain, as in fact he did. Thus the transferring order was not to a division of three judges, but to the same two judges who had, in the original decision, so misunderstood the applicable deportation law.

This course violated at least the spirit of 28 U.S. Code § 46. That section requires that appeals be determined by a division of three judges or by the full court. While it provides, for obvious practical considerations, that two judges shall constitute a quorum of a three-judge division, the clear basic intention is that decisions shall be by three judges. This intention was vitiated by a transfer which guaranteed that only two judges would participate.

Thus a curious climax was supplied to this curious litigation. Petitioner is faced with a cruel and irra-

tional deprivation of his personal liberty. The deportation order against him is erroneous on principle and probably under the decisions of this Court. The order was sustained on the basis of an erroneous legal analysis conceived by the Court of Appeals entirely on its own. As a result, the court never reached the real issue in the case, namely, the burden of proof question which was not settled by *Rowoldt*. Nor did the court evaluate the evidence in the light of the *Rowoldt* standard. The BIA, incredulous that the court could have meant what it said, denied petitioner the opportunity to prove that he is not deportable even under the court's erroneous theory. In so doing, the BIA relied on that part of the court's decision which favored the government, while rejecting that part which favored petitioner. When the case came back to the Court of Appeals, and despite the later decision by this Court in *Scales*, the court simply washed its hands of the matter, the new appeals being decided summarily and without explanation and by the same two judges who had created the untenable situation. This process did not comport with the proper administration of justice.

## CONCLUSION

The judgments below should be reversed with directions to enter judgment setting aside the deportation order and terminating the deportation proceeding.

Respectfully submitted,

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